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'CHILLING EFFECT' CITED IN

By DAVID CROOK,
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FCC DECISION

Government agencies have been granted a potentially powerful weapon to challenge what they believe is unfair or distorted broadcast news coverage, leading First Amendment experts said Monday in discussing a new decision by the Federal Communications Commission.

In a decision announced Friday, the FCC said that the government may legally contest the fairness of news broadcasts and, by extension, challenge broadcasters' rights to hold radio and TV station licenses.

The ruling was made even though the FCC denied a controversial complaint filed by the Central Intelligence Agency against ABC News and even though commission members and staffers concluded that ABC engaged in poor journalistic practices.

"The bringing of that suit by the CIA was an improper thing to do," said Alan Reitman, associate executive director of the American Civil Liberties Union in a telephone interview. "If this (the fairness doctrine) is held to apply to a government agency, then we are concerned about the chilling effect on investigative reporting."

Reitman said that the ACLU will "consider moving into the federal courts" to challenge the FCC's decision. In reaction to the CIA's complaint, the ACLU had sought a specific ruling barring fairness doctrine challenges by federal agencies.

Bob Gurs, an attorney with the Washington-based public-interest law firm Media Access Project, said Monday that the ruling is "contrary to First Amendment principles (in allowing) a government agency to file a complaint with another agency of the government."

Gurs also argued that the FCC's ruling left open the way for other government agencies to challenge broadcast coverage that they may find distorted or unfair. "You will have governments—the Attorney

General, for instance—filing complaints and scaring broadcasters," Gurs said.

Steve Bookshester, attorney for the National Assn. of Broadcasters, said the FCC decision is "clearly something that's troubling." His association, he noted, had joined a number of professional groups that had filed briefs in the CIA-ABC case arguing that the FCC should turn down the CIA's complaint on the basis that federal agencies should not be allowed to bring cases to the commission.

"As a matter of law and as a matter of policy, we thought it was

wrong for the commission to consider that complaint," Bookshester said.

In turning down the CIA's complaint but affirming its right to complain, the FCC established a broad expansion of government power—an unusual action for an FCC that has been noted for its reluctance to exercise any but the most minimal regulatory power over broadcasters. Before the CIA's complaint, first filed last November, the issue of a government agency's standing had never come before the FCC.

Stanley Sporkin, CIA general counsel, said Monday that the agency was "obviously disappointed but pleased that we've been vindicated on the issue of whether we had standing (to bring an action before the FCC)." Sporkin said the agency has not yet decided whether it will appeal the FCC ruling and would not make a decision until the commission hands down its written ruling—late this week, at the earliest.

"There's no such thing as winning or losing in these things," Sporkin said. "It is clear that a terribly erroneous news story was broadcast and that there is no recourse to having a network take remedial action."

In its complaint, the CIA charged that ABC violated the FCC's fairness doctrine and its rules against deliberate news distortion in a

two-part "World News Tonight" broadcast last fall. Despite an overwhelming amount of contrary evidence, ABC claimed to have proved that the CIA engaged in an array of illegal activities through a now-defunct Hawaii investment firm. Included in ABC's broadcasts was an unsubstantiated claim—later retracted—that the CIA plotted to murder investment counselor Ronald Ray Rewald, whom ABC identified as a covert CIA agent.

The CIA charged that ABC had created "artificial news" and created its story "out of thin air." The intelligence agency asked the FCC to investigate how ABC managed to broadcast a story with so little apparent basis in fact. ABC has continued to stand by most of its reporting in the story. The network insists that the CIA's refusal to cooperate with reporters allowed them to broadcast unsubstantiated and uncorroborated charges.

The FCC, however, never questioned ABC about the story and ruled that the CIA failed to establish a prima facie case. The FCC said the CIA failed to provide so-called "extrinsic" evidence that officials of the network deliberately set out to falsify the broadcasts.

"What might be described as 'news negligence' is different from what the commission looks at as extrinsic fraud," said Dann Brenner, senior adviser to FCC Chair-

man Mark Fowler. "If you could prove that a news director said, 'I want this result,' I think that would evidence extrinsic fraud. If it was an out-and-out lie, intentionally done, the commission would look at something like that."

In a statement, Chairman Fowler insisted that the fairness doctrine clearly grants government agencies the right to challenge broadcasters before the commission.

"If the Federal Reserve Board or the State of Hawaii had been the complainant, the question of standing would probably have gone unnoticed. . . . I doubt anyone would find it inappropriate."

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Fowler also used the opportunity of the CIA-ABC case to argue that the fairness doctrine itself—which requires broadcasters to air all sides of controversial issues of public importance—is at the heart of the First Amendment problem created by the commission's ruling. The FCC decision's apparent "chilling affect" on broadcasters' rights "has its cause in the fairness doctrine, not the CIA," Fowler said.

Although the CIA failed to prove that ABC deliberately distorted the facts of the Rewald case, Commissioner James Quello said Monday that the network engaged in "journalistic malfeasance" and "shoddy journalism."

"The networks—in this case ABC—are very lucky that this commission doesn't believe in substituting its editorial judgment for broadcasters'," Quello said.



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Ronald Ray Rewald, left, cited by ABC as a covert CIA agent, and Federal Communications Commission Chairman Mark Fowler.